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In The

Supreme Court of the United States

DONALD STENBERG, in his official capacity as Attorney General for the State of Nebraska, *et al.*,

Petitioners,

vs.

LEROY H. CARHART,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF AMICUS CURIAE OF RIGHT TO LIFE ADVOCATES, INC. IN SUPPORT OF THE PETITIONERS

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Comes now RIGHT TO LIFE ADVOCATES, INC. ("Life Advocates"), by and through its attorney of record, and, acting pursuant to Rule 37 of the Rules of this Court, moves the Court for leave to file an amicus curiae brief in the within cause on behalf of Petitioners, showing respectfully the following:

1. By Letter dated February 18, 2000, Deputy Attorney General Steve Grasz of the State of Nebraska advised the attorney herein that "[p]ursuant to our agreement with opposing counsel regarding mutual consent to a limited number of amicus briefs, we are not able to provide consent to your brief."

2. Life Advocates is a non-profit membership corporation organized under the laws of the State of Texas with a tax exempt status under §501(c)(4) of the Internal Revenue Code of the United States. It is a Houston-based pro-life organization dedicated to the preservation of the sanctity of human life from conception until natural death.

The instant case presents an issue of first impression for this Court and, in addressing same, it is believed that the Court will have an opportunity to reconsider and overrule *Roe v. Wade*, 410 U.S. 113 (1973). Life Advocates is interested in having states like Nebraska enact and enforce laws proscribing partial birth abortions because this will prevent some abortions and, as a result, save some human lives. It also has an abiding and obvious interest in the overrule of *Roe*.

3. Based on the approach to this case taken by the Court of Appeals and this Court's Order granting review herein, it is believed that an extremely important issue – the inapplicability of *Roe* and the "undue burden" standard of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 883 (1992), to Nebraska's proscription of partial birth abortions – either will not be addressed or addressed fully by the parties to this case.

In this regard, the Texas anti-abortion law held unconstitutional in *Roe* dealt only with abortion *in utero*. This Court has never addressed any right of abortion where an Unborn Child is delivered at least partially *ex utero* or where parturition of the mother has commenced. That being the case, questions of the creation of a new right to abortion or the extension of *Roe* into this area should come to the fore, giving the Court an opportunity to reconsider and overrule *Roe* on constitutional and jurisdictional grounds and, in the process, to hold that an Unborn Child is a person under the 14th Amendment to the Constitution.

4. It is believed that the Amicus Curiae Brief of Life Advocates, which follows this Motion, will be of assistance to the Court in deciding this case and in correcting the abuse of power evident in *Roe*.

Respectfully submitted,

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INTEREST OF THE AMICUS CURIAE

Right to Life Advocates, Inc. is a Texas non-profit membership corporation with a tax-exempt status under Section 501(c)(4) of the Internal Revenue Code of the United States. It is a Houston-based pro-life organization dedicated to the preservation of the sanctity of human life from conception to natural death. It is opposed to the practice of abortion as provided by the companion cases of *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), and their progeny.

The instant case presents the Court with an opportunity to determine an issue of first impression, i.e., whether the State of Nebraska (and other States) may enact legislation which proscribes the deliberate and intentional partial delivery of an Unborn Child into the mother's vagina for the purpose of performing an abortion procedure which the performer knows will kill and does kill such Unborn Child. Texas has a somewhat similar law which may be affected by the Court's decision in this case. Amicus is interested in the enactment and enforcement of laws of this nature because this will prevent some abortions and, as a result, save some human lives.

Moreover, this case presents the Court with the opportunity to reconsider and overrule *Roe v. Wade*. Amicus has an abiding and obvious interest in such overrule and in the constitutional protection of the fundamental natural right to life of Unborn Children in this Nation.

SUMMARY OF ARGUMENT

A. The Court of Appeals erred when it held unconstitutional Nebraska's statutory ban on partial birth abortions based on the "undue burden" test of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 883 (1992), because the abortion "right" established in *Roe v. Wade* did not apply to such abortions. This is because *Roe* dealt only with Texas' proscription of abortion *in utero*. The Nebraska law addresses abortion where the Unborn Child, or a substantial part thereof, is deliberately and intentionally delivered into the mother's vagina for purposes of destroying the life of such Unborn Child and results in such destruction.

Moreover, this Court has never extended the abortion "right" of *Roe* to cover abortion where part of the Unborn Child is delivered vaginally or where childbirth has commenced.

B. This Court should not create a new right for partial birth abortions because the Constitution recognizes no such right, nor would it meet the traditional constitutional tests for recognition of an unenumerated fundamental right set by this Court. See *Bowers v. Hardwick*, 478 U.S. 186, 191-192 (1986).

Further, creation of any such new right would deprive Unborn Children of their lives and property interests without due process of law, in violation of the Due Process Clause of the 5th Amendment to the Constitution. Unborn Children are persons within the reach of such Clause since they meet the live human being test of personhood under the Equal Protection Clause of the 14th Amendment to the Constitution. See *Levy v. Louisiana*, 391

U.S. 68, 70 (1968). Personhood under such Clause constitutes personhood under the Due Process Clause of the 14th Amendment and should constitute personhood under the Due Process Clause of the 5th Amendment.

In addition, the Court would lack personal jurisdiction over the affected Unborn since they were not represented in the instant case. See *McArthur v. Scott*, 113 U.S. 340, 391-392, 395, 404 (1885). Hence, creation of such a right would be unconstitutional as violative of the Due Process Clause of the 5th Amendment.

Finally, creation of any such right, which would be in tanden with *Roe*, would compound and vest further the constitutional errors of *Roe*.

C. The abortion "right" of *Roe* should not be extended to cover partial birth abortions because *Roe* is an unconstitutional decision and should be overruled instead of expanded or enhanced.

1. The Due Process Clause of the 14th Amendment does not include any liberty of abortion. The Constitution is silent on this subject, and domestic law had long considered induced abortion to be a crime. See *Casey, supra*, 505 U.S. at 980 (Scalia, J., joined by Rehnquist, C.J., White, J. and Thomas, J., concurring in the Judgment in part and dissenting in part). Moreover, such "right" did not meet any standard established by this Court for the recognition of an unenumerated fundamental right.

2. *Roe*, is void as violative of the Due Process Clause of the Fifth Amendment and of fundamental principles of personal jurisdiction. Neither Abortion "Survivor" Children nor Unborn Children were represented before the

3-Judge District Court or this Court in *Roe* as they were entitled, and neither Court had personal jurisdiction over such Children. The abortion "right" of *Roe* discriminates invidiously against affected Unborn Children as compared to corporations and the nonabortion born. *Roe* permitted the lives and property interests of Abortion "Survivor" Children and affected Unborn Children to be destroyed.

3. Finally, the Court in *Roe* exceeded its jurisdiction under Article III, §2, of the Constitution with its manufacture of the abortion "right" and its deprivation and limitation of reserved constitutional authority of the states to legislate, etc. in this area of interest.

Roe should be reconsidered and overruled and, in the process, the Court should hold that an Unborn Child is a person covered by the Due Process Clause of the 14th Amendment.

ARGUMENT

I.

THE COURT OF APPEALS ERRED IN APPLYING THIS COURT'S UNDUE BURDEN STANDARD OF *CASEY* TO THE NEBRASKA STATUTORY LAW INVOLVED

A. The Nebraska Statutory Law. §28-328, *Rev. Stats. of Neb.* (1998 Cum. Supp.), provides, in pertinent part:

> (1) No *partial-birth abortion* shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.
>
> (2) The intentional and knowing performance of an unlawful partial-birth abortion in violation of subsection (1) of this section is a Class III felony.
>
> (3) No woman upon whom an unlawful partial-birth abortion is performed shall be prosecuted under this section or for conspiracy to violate this section.
>
> (4) The intentional and knowing performance of an unlawful partial-birth abortion shall result in the automatic suspension and revocation of an attending physician's license to practice medicine in Nebraska by the Director of Regulation and Licensure pursuant to sections 71-147 to 71-161.20. (Emphasis added.)

* * *

§28-326(9), *Rev. Stats. of Neb.* (1998 Cum. Supp.), defines "partial-birth abortion" as

> an abortion procedure in which the person performing the abortion *partially delivers vaginally* a living unborn child before killing the unborn child and competing the delivery. For purposes of this subdivision, the term *partially delivers vaginally* a living unborn child before killing the unborn child *means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.* (Emphasis added.)

B. Inapplicability of *Roe v. Wade*, Etc. to This Case. In *Roe v. Wade, supra,* 410 U.S. 113, this Court said that "[t]he Texas statutes that *concern us here* are Arts. 1191-1194 and 1196 of the State's Penal Code" (*id.* at 117), and quoted them in the first five paragraphs of footnote 1 (*id.* at 117-118, n. 1). These statutes were the ones "under attack here" (*id.* at 116). Article 1191 of the former *Texas Penal Code* proscribed procurement of an abortion upon a pregnant woman, and defined abortion as meaning " 'the life of the fetus or embroy shall be destroyed *in the woman's womb, or that a premature birth thereof be caused*' " (*id.* at 117, n. 1). (Emphasis added.) Under Article 1196 of such former Code, the Chapter was not to apply to " 'an abortion procured or attempted by medical advice for the purpose of saving the life of the mother' " (*id.* at 118, n. 1).

The Court was not concerned with Article 1195 of such Code which was not challenged in the case. After quoting Articles 1191-1194 and 1196, above, it said, in pertinent part (*ibid.*):

> The foregoing Articles, together with Article 1195, compose Chapter 9 of Title 15 of the Penal Code. Article 1195, *not attacked here,* reads:
>
> "Art. 1195. Destroying unborn child
>
> "Whoever shall *during parturition of the mother* destroy the vitality or life in a child *in the state of being born and before actual birth, which child would otherwise have been born alive,* shall be confined in the penitentiary for life or for not less than five years." (Emphasis added.)[1]

[1] See *Vernon's Tex. Civ. Stats. Ann.,* Art. 4512.5.

Against this background, it is clear that the challenge before the Court in *Roe* involved the proscription of abortion *in utero,* that is, while the Unborn Child was " 'in the woman's womb' ", per the definition of abortion in Article 1191, above. it did not involve the proscription of abortion *ex utero,* that is, during childbirth per Article 1195 or where the Unborn Child was, to any extent, outside of the womb.

Moreover, this Court has never extended *Roe* or the abortion "right" established therein to situations where an Unborn Child is delivered partially into the vagina for purposes of destruction. Nor has it done so after the birth process has commenced.

Accordingly, *Roe* and its progeny, including *Planned Parenthood of Southeastern Pennsylvania v. Casey, supra,* 505 U.S. 883, are inapplicable to the fact situation presented by the Nebraska statutory law at bar.

C. The Court of appeals Erred in Applying *Casey* to the Nebraska Statutory Law at Issue. The Court of Appeals erred when it held unconstitutional Nebraska's statutory ban on partial birth abortions based on the "undue burden" standard of *Casey* because the abortion "right" established in *Roe* did not apply to such abortions.[2]

[2] In *Hope Clinic v. Ryan,* 195 F. 3d 857 (7th Cir. 1999), the Court of Appeals applied *Casey,* etc. and the abortion "right" of *Roe* to the partial birth abortion statutory bans of three other States. This approach was erroneous since the abortion "right" of *Roe* did not extend to partial birth abortions.

As shown above, *Roe* was concerned *only* with abortion *in utero*. It was never extended to cover the situation where the Unborn Child was partially *ex utero* or in the state of being born. Since §§28-326(9) and 28-328(1), above, proscribe partial birth abortions where the Unborn Child is delivered fully or in substantial part into the mother's vagina, etc., neither *Roe* nor *Casey* have any application to the constitutional merits of such legislation.

That being the case, the holding by the Court of Appeals that they would prohibit "the most common procedure for second-trimester abortions [the D&E procedure]" and, in so doing, "impose an undue burden on a woman's right to choose to have an abortion" (192 F. 3d at 1151) is erroneous.

Moreover, the Court took, as a given, that an abortion method, however named, where a portion of the Unborn Child is delivered outside of the uterus, was authorized under *Roe*. This position is erroneous since nothing in *Roe* supports or even addresses that subject.

Respondent acknowledged that, in a "D&E" (dilation and evacuation) procedure, dismemberment occurs after part of the fetus has been pulled through the cervix, and testified that he did not know of any way that dismemberment could occur inside the uterus since " '[i]t takes something that restricts the motion of the fetus against what you're doing before you're going to get dismemberment' " (192 F. 3d at 1147).[3] Such a D&E procedure is no

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[3] A second trimester D&E abortion at 14-20 weeks of pregnancy is a two stage procedure – dilating the cervix, followed a day later by vacuuming and scraping *within* the uterus. Mildred S. Hanson, M.D., "The Second Trimester D&E Abortion Procedure", pp. 1, 2, Mildred Hanson MD, Minneapolis, Minnesota – Abortion Clinics Online, hhtp://gynpages.com/hanson/2.html.

more or less than a partial birth abortion of a kind not covered by *Roe* and *Casey* and about which Nebraska (and the other States) may proscribe. The fact that he may have been performing such procedures with impunity and for some time could not fortify implicitly that it was authorized by *Roe* or provide insulation to him (or others similarly situated) from the proscriptions of such law. It means simply that Nebraska has moved to proscribe a practice deemed inimical to the public health, safety and morals in the State.

Accordingly, §§28-328(1) and 28-326(9) here involved do not constitute an undue burden to exercise of the abortion "right" created by *Roe*. Instead, they constitute reasonable and proper exercises of the State's reserved police power of protecting from destruction the lives of Unborn Children within the State. They bear a meaningful relation to a public end, namely, protection and enhancement of public safety and public morals, and the means employed are adapted reasonably to do this and are neither arbitrary nor oppressive. See *Treigle v. Acme Homestead Ass'n.*, 297 U.S. 189, 197 (1936). That the State of Nebraska has a legitimate interest in exercising legislative authority in the protection of unborn human life is unquestioned. See *Casey, supra*, 505 U.S. at 846.

II.

THIS COURT SHOULD NOT CREATE A NEW RIGHT FOR PARTIAL BIRTH ABORTIONS

Since the abortion "right" of *Roe* does not extend to a "right" to destroy an Unborn Child which is delivered partially into the mother's vagina, this Court, for a number of reasons, should not use this case to fashion a right to do so.

A. No Constitutional Right of Abortion Extending Ex Utero. There is *nothing* in the U.S. Constitution which would authorize the Court to fashion a new right for partial birth abortions. Not only is the Constitution silent on the subject of abortion, see *Casey, supra*, 505 U.S. at 980 (Scalia, J., joined by Rehnquist, C.J., White, J. and Thomas, J., concurring in the judgment in part and dissenting in part), but creation of such a right would not meet the traditional constitutional tests for recognition of an unenumerated fundamental right. See *Bowers v. Hardwick, supra*, 478 U.S. at 191-192. See Section III-A-1, pp. 13-14, below. Hence, creation of such a right would exceed the Court's jurisdiction under Article III, §2, of the Constitution.

If the Court were to create such a right, what would be its bounds? At what point in the delivery process would it commence and when would it terminate? Would it exist after delivery but before severance of the umbilical cord? Would it exist after parturition has commenced naturally? Or when it has commenced after inducement?

B. Absence of Personal Jurisdiction Over Affected Unborn Children. Unborn Children affected by partial birth abortions were not represented in the proceedings

in this case by guardian or next friend. Yet their vital interests were at stake. Since they were not represented before the lower courts herein, as they were entitled to be, see *McArthur v. Scott, supra*, 113 U.S. at 391-392, 395, 404, this Court lacks personal jurisdiction over them for any fashioning of a right in their mothers to destroy them by partial birth abortions. Any such action would be void as violative of the Due Process Clause of the 5th Amendment to the Constitution. See *ibid.*

C. Deprivation of the Lives and Property Interests of Affected Unborn Children Without Due Process of Law. Creation of any such new right would deprive affected Unborn Children of their lives and property interests without due process of law, in violation of the Due Process Clause of the 5th Amendment to thee Constitution. Unborn Children are persons[4] within the reach of such Clause since they meet the live human being test of personhood under the Equal Protection Clause of the 14th Amendment to the Constitution. See *Levy v. Louisiana, supra*, 391 U.S. at 70, where this Court declared, as to illegitimate children there involved, "[t]hey are *humans, live, and have their being*. They are clearly 'persons' within

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[4] In addressing the "personal security" aspect of a natural person, William Blackstone said that "THE right of personal security consists in a *person's* legal and uninterrupted enjoyment of *his life*, his limbs, his body, his health, and his reputation", and that "LIFE is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as *an infant is able to stir in the mother's womb* * * *." I Blackstone, *Commentaries on the Laws of England* (circa 1765), pp. 123, 129.

the meaning of the Equal Protection Clause of the Fourteenth Amendment." (Emphasis added.) There is no distinction between persons under that Clause and the Due Process Clause of such Amendment. Well over a century ago, this Court declared that these clauses were *"universal in their application, to all persons within the territorial jurisdiction,* without regard to any differences of race, of color, or of nationality * * * ". *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886). (Emphasis added.)

As shown below, Unborn Children have substantial legal recognitions and property interests under domestic U.S. law. The continuation of the lives of affected Unborn Children together with all of their property interests would be subject to destruction by any new right which this Court might create for partial birth abortions.

Amicus submits that the live human being test of *Levy* should also be the test of personhood of natural persons[5] under the Due Process Clause of the 5th Amendment. The operative wording of the two due process clauses is identical and their reaches are broad. Accordingly, this Court would lack constitutional jurisdiction to fashion a right to obtain a partial birth abortion since any such action would deprive affected Unborn Children of their lives and property interests without due process of law, in violation of such 5th Amendment.

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[5] *Roe*'s conclusion that "the unborn have never been recognized in the law as persons in the whole sense" (410 U.S. at 162) ignores the live human being test of personhood under the Equal Protection Clause of the 14th Amendment per *Levy,* above.

D. Further Vesting of Constitutional Error. As shown below, *Roe* is an unconstitutional decision, and any creation of a right for partial birth abortions, which would be in tandem with *Roe,* would compound and vest further the errors of *Roe.* Amicus submits that this Court should correct constitutional error when presented with the opportunity so to do, and that vested error should have no place in the constitutional law or life of this Nation.

III.

THE ABORTION "RIGHT" ESTABLISHED IN *ROE* SHOULD NOT BE EXTENDED TO COVER PARTIAL BIRTH ABORTIONS

A. Roe Is an Unconstitutional Decision. The abortion "right" of *Roe* should not be extended to cover partial birth abortions because *Roe* is an unconstitutional decision which should be overruled instead of expanded or enhanced.

1. The 14th Amendment to the Constitution Does Not Include Any "Liberty" of Abortion. While this Court fashioned the abortion right from the "liberty" reach of the Due Process Clause of the 14th Amendment, it is clear that the Constitution is silent on the subject of abortion. See *Casey, supra,* 505 U.S. at 980 (Scalia, J., joined by Rehnquist, C.J., White, J., and Thomas, J., concurring in the Judgment in part and dissenting in part). It does protect the life right of persons from federal and state deprivation without due process of law. It is inconceivable how the life right of persons so protected against state deprivations could be subordinated to a "liberty" to

destroy it prenatally by abortion when, as a matter of common knowledge, the lives of such persons commence prenatally.

Moreover, "the longstanding traditions of American society have permitted it [abortion] to be legally proscribed." *Ibid.* (Footnote omitted.) In *Roe*, this Court created a fundamental constitutional right of abortion. Fundamental liberties not enumerated in the text of the Constitution, however, have been defined as "those that are 'deeply rooted in the Nation's history or tradition' " or, more narrowly, "those interests that are 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [they] were sacrificed.' " *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 790-791 (1986) (White, J., joined by Rehnquist, J., dissenting). See *Bowers v. Hardwick, supra*, 478 U.S. at 191-192. Was abortion deeply rooted in the history or traditions of this Nation? Would liberty or justice cease to exist if the decision to abort was sacrificed? How could an act long recognized as criminal and evil achieve such a lofty stature?

In short, the Court exceeded its jurisdiction under Article III, §2, of the Constitution and in the process, deprived and limited the constitutional jurisdiction of the States in this area of vital interest.

2. *Roe* Is Void as Violative of the U.S. Constitution and Fundamental Principles of Personal Jurisdiction. At the threshold, it is well established that if a court in the United States violates the U.S. Constitution in a proceeding before it, it loses jurisdiction to proceed to judgment and any "judgment" which it might render would be

void. *Johnson v. Zerbst*, 304 U.S. 458, 467-468 (1938); *Windsor v. McVeigh*, 93 U.S. 274, 277-284 (1876). This Court is capable of violating the Constitution and even *admitted* that it and lower courts had done so with application of the doctrine of *Swift v. Tyson*, 16 Pet. 1 (1842). *Erie R. Co. v. Tompkins*, 304 U.S. 64, 77-78, 79-80 (1938). The unconstitutionality of *Roe* is pervasive:

a. No Representation of Abortion "Survivor" Children or Unborn Children. Neither Unborn Children nor Abortion "Survivor" Children were represented before the 3-Judge District Court or this Court in *Roe*. Abortion "Survivor" Children, i.e., Children who are brought forth alive *after* the abortion procedure but are doomed to die and do die primarily due to prematurity, abortional injury or lack of care are U.S. Citizens (with extremely minor exceptions) under the Citizenship Clause of the 14th Amendment and "persons" under the Due Process Clause of the 5th Amendment to the Constitution. Occasionally an Abortion "Survivor" Child is murdered outright. See *Showery v. State*, 690 S.W. 2d 689, 694, 695-696 (Tex. App. – El Paso 1985, pet. ref.) (where a physician drowned a girl of about 6-months gestational age in a bucket of water). *Roe* permitted such Children to be brought forth in an environment where the goal is death. These Citizen Children were entitled to be represented in the very proceedings which affected them so personally. Since they were not, *Roe* is void as violative of the Due Process Clause of the 5th Amendment. See, in different context, *Pennoyer v. Neff*, 95 U.S. 714, 733, 734 (O.T., 1877).

Unborn Children also were entitled to be represented in *Roe* since they met the live human being test of 14th Amendment personhood per *Levy v. Louisiana*, above.

Since born persons have 14th Amendment personhood, and since such persons did not originate at birth, it follows that their personhood existed prenatally. This is fortified by the fact that Unborn Children have well recognized legal statures and rights. Rights exist in persons or legally recognized entities. Since Unborn Children affected by abortion were not represented in *Roe*, as they were entitled to be, see *McArthur v. Scott, supra*, 113 U.S. at 391-392, 395, 404, that decision is void as violative of the Due Process Clause of the 5th Amendment to the Constitution.

b. No Personal Jurisdiction Over Abortion "Survivor" Children or Unborn Children. Neither the 3-Judge District Court nor this Court in *Roe* had personal jurisdiction over Abortion "Survivor" or Unborn Children. Yet such Children were affected personally and vitally by such proceedings and had the right to be before the Courts through their representatives. Since they were not, the District Court and this Court lacked jurisdiction to pronounce judgments affecting them personally. Accordingly, the judgments of such Courts are void as violative of fundamental principles of personal jurisdiction and constitute life, liberty and property deprivations of such Children without due process of law, in violation of the Due Process Clause of such 5th Amendment.

c. Invidious Discriminations Against Unborn Children. With *Roe*, this Court discriminated invidiously against Unborn Children as to 14th Amendment personhood as compared to corporations and the nonaborted born. This operated to deprive such Children of life, liberty and property without due process of law, in violation of the Due Process Clause of such 5th Amendment.

Corporations, which are *artificial* beings, have long been considered "persons" under the Due Process and Equal Protection Clauses of said 14th Amendment, while *natural* and *living* unborn human beings, recognized in law and possessive of substantial legally cognizable rights, are not. The Constitution does not even *mention* corporations. Yet the "Blessings of Liberty" were intended to be *secured* to the "People" of this Nation and to *their* "Posterity", see Preamble to the Constitution, and the Constitution protects the life and other rights of persons against federal and state deprivations without due process of law, above. A prematurely born Child of 7 gestational months has 14th Amendment "personhood", while an older and more developed Unborn Child of 8 gestational months does not. Such discriminations are invidiously discriminatory and violate the Due Process Clause of such 5th Amendment.

d. Naked Deprivation of the Legally Cognizable Rights of Abortion "Survivor" Children and Unborn Children. The Due Process Clause of the 5th Amendment stood as a bar to the Decision and Judgment in *Roe* which endangered the life and other rights of Abortion "Survivor" Children and authorized the destruction of the life and other rights of Unborn Children. This constituted nothing but a naked destruction of the life and other rights of the such Children in this Nation, in violation of the Due Process Clause of such 5th Amendment.

Abortion "Survivor Children are U.S. Citizens and possess a wide array of property and other rights, including the right to continue to live, to support, etc. They have rights under the Due Process Clause of the 5th Amendment not to be deprived of their lives, liberties or

properties by this Court without due process of law. *Roe* is a contradiction of due process.

Unborn Children have legal statuses and substantial legally cognizable rights under statutory and case law, but these rights are subject to destruction by exercise of the abortion "right" of *Roe*. For example, an Unborn Child is recognized under the prenatal tort injury doctrine, with a duty of care owed to such Child [*Yandell v. Delgado*, 471 S.W. 2d 569 (Tex. 1971); Prosser, *Handbook of the Law of Torts* (4th ed., 1971), §55, pp. 335-338], and is entitled to be represented in proceedings in which he or she is affected [*McArthur v. Scott, supra*, 113 U.S. at 391-392, 395, 404. A pregnant woman may be required to undergo a lifesaving blood transfusion for herself and her Unborn Child [*Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson*, 201 A. 2d 537, 538 (S.C. N.J., 1964), *cert. denied*, 337 U.S. 985 (1965)], and a lifesaving caesarean section [*Jefferson v. Griffin Spaulding Co. Hosp. Authority*, 274 S.E. 2d 457, 459, 460 (S.C. Ga., 1981)]. An Unborn Child is dependent upon his father as well as his mother for support within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* [*Tex. Employers' Ins. Co. v. Shea*, 410 F. 2d 56, 61, 62 (5th Cir. 1969)], and, under the "living with" provisions of the Social Security Act, Subchapter II, 42 U.S.C. §401 *et seq.*, "is sufficiently 'in being' to be capable of 'living with' the father at the time of his [the father's] death" [*Wagner v. Finch*, 413 F. 2d 267, 268-269 (5th Cir. 1969)]. A remainder interest in real property may vest in an Unborn Child [*Crisfield v. Storr*, 36 Md. 129, 146 (Ct. App. Md., 1872)]. So too with a beneficial interest under a trust [*Medlock v. Brown*, 136 S.E. 551, 553 (S.C. Ga., 1927)]. In Texas, an

Unborn Child is entitled to take a wrongful death award on the death of his father [see *Brantley v. Boone*, 34 S.W. 2d 409, 411 (Tex. Civ. App. – Eastland 1931, no writ)], and may take, as a posthumous child, an interest under the will of his or her father or an intestate share where there is no will [*Tex. Probate Code*, §§41(a), 67(b)]. Other States accord the same or similar treatment to posthumous children.

e. Unlawful Manufacture of the "Liberty" of Abortion. Finally, the Court exceeded its jurisdiction under Article III, §2, of the Constitution when it *manufactured* unlawfully a "liberty" to abort and, in the process, deprived and limited the States of *their* reserved authorities under the division of powers concept of the 10th Amendment to the Constitution to legislate, etc. in this traditional area of interest. See, in a different context, *Erie R. Co. v. Tompkins, supra*, 304 U.S. at 77-78, 79-80. See Section III-A-1, pp. 13-14, above.

B. *Roe* Should Be Reconsidered and Overruled, Etc. For the reasons and authorities set forth in Section III, above, the Court should reconsider and overrule *Roe* and, in the process, hold that an Unborn Child is a person covered by the 14th Amendment to the Constitution.

CONCLUSION

For the reasons and authorities set forth, above, Amicus Curiae submits respectfully that the Court should reverse the Judgment of the Court of Appeals and render judgment that the Nebraska statutory law under challenge herein is constitutional. In addition, Amicus submits that the Court should not establish a right for partial birth abortions; that it should not extend the abortion "right" of *Roe* to such an area; and that it should reconsider and overrule *Roe* and hold that an Unborn Child is a person under the 14th Amendment to the Constitution.

Respectfully submitted,

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